OCT 27 1920

[illegible] COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 443

GUY B. FOSTER, ET AL.,

Appellants,

vs.

EMORY BAY, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

HENRY H. BROOKS,
GAITHER KENDALL,
WALKER B. KOON,
Counsel for Appellants.

HUBERT H. HALL,
BELL PALMER,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	2
Question presented	2
Statutes involved	3
Statement	3
Jurisdiction	8
Manner in which the federal question was raised	9
The federal question is substantial	10
This is a "test" case which will determine whether hundreds of taxpayers are subject to the taxes imposed by the challenged statutes	10
The "classification" employed by the challenged statutes for continuing the state tax upon certain properties, while abolishing the tax as to all others of the original class, bears no proper or reasonable relation to the object of the legislation	11
The differences employed to limit the tax to specified geographical areas are not reasonably related to the stated object of raising funds "for general revenue purposes" of the state	12
The differences employed by the statutes to limit the tax to minor geographical areas are not reasonably related to the object of raising funds to pay off and discharge the appropriation made by the State to the Brazos River Conservation and Reclamation District	15
Conclusion	18
Appendix "A"—Opinion of the Court of Civil Appeals of Texas	20

Appendix "B":

Page

Item 1—Constitution of the State of Texas, Article VIII, Section 1-a 24
Item 2—Acts of the Fifty-first Legislature of Texas, 1949, Chapter 464, Section 10(a), Pages 849 and 853 ..... 3, 25
Item 3—Acts of the First Called Session of the Forty-fourth Legislature of Texas, 1935, Chapter 368, Page 1527 (The Tax Donating Act.) 28
Item 4—Acts of the Regular Session of the Fiftieth Legislature of Texas, 1947, Chapter 457 (Act extending term of grant of State ad valorem taxes to certain Public Agencies.) 29

Appendix "C":

Item 1—Minutes of the Automatic Tax Board of Texas, dated July 20th, 1951 31
Item 2—Minutes of the Automatic Tax Board of Texas, dated July 21st, 1952 34
Item 3—Minutes of the Automatic Tax Board of Texas, dated July 20th, 1953 36

TABLE OF CASES CITED

Adam v. *Saenger*, 303 U.S. 59 9
Adamson v. *People of the State of California*, 332 U.S. 46 ..... 9, 11
Bacon v. *Texas*, 163 U.S. 207 9
Brazos River Conservation and Reclamation District v. *McCraw*, 126 Texas. 506, 91 S.W. 2d 665 ..... 5, 15, 16
Carmichael v. *Southern Coal and Coke Company*, 301 U.S. 495 ..... 14, 16
Charleston Federal Savings and Loan Association v. *Alderson*, 324 U.S. 182 10
City of Aransas Pass v. *Keeling*, 112 Tex. 339, 247 S.W. 817 5
Fallbrook Irrigation District v. *Bradley*, 164 U.S. 112 ..... 15, 18
Foster, et al. v. *Bay, et al.*, 255 S.W. 2d 898 2
Hagar v. *Reclamation District*, 111 U.S. 701 15

Page

Hartford Steam Boiler Inspection and Insurance Company v. *Harrison*, 301 U.S. 459 ..... 11, 12, 16
Hillsborough v. *Cromwell*, 326 U.S. 620 ..... 11, 12
Home Insurance Company v. *Dick*, 281 U.S. 397 10
Hopkins v. *Southern California Telephone Company*, 275 U.S. 393 11
King Manufacturing Company v. *Augusta*, 277 U.S. 100 ..... 9, 11
Louisville Gas Company v. *Coleman*, 277 U.S. 38 ..... 11, 13
Milheim v. *Moffatt Tunnel District*, 262 U.S. 55 18
Nashville, C. and Saint Louis Railway v. *Walters*, 294 U.S. 405 14
New York Rapid Transit Corporation v. *City of New York*, 303 U.S. 573 ..... 14, 16
Norfolk Turnpike Company v. *First National Bank*, 225 U.S. 264 9
Royster Guano Company v. *Virginia*, 253 U.S. 412 11
Sullivan v. *Texas*, 207 U.S. 416 9
United Gas Public Service Company v. *Texas*, 301 U. S. 667 9
Williams v. *Bruffy*, 96 U.S. 176 11

STATUTES AND OTHER AUTHORITIES CITED

Acts of the First Called Session of the Forty-second Legislature of Texas, Chapter 13, Section 5, as amended by Chapter 5 4
Acts of the First Called Session of the Forty-fourth Legislature of Texas, Chapter 368, Page 1527 4
Acts of the Forty-fourth Legislature of Texas, 1935, Chapter 13, Section 3, as amended by Chapter 19, Page 56 4
Acts of the Regular Session of the Forty-sixth Legislature of Texas, House Bill 52 17
Acts of the Regular Session of the Fiftieth Legislature of Texas, Chapter 457, Pages 1071, 1072 6
Acts of the Regular Session of the Fifty-first Legislature of Texas, 1949, Chapter 464, Section 10(a), Subsection 4, Pages 849 and 853, as amended by Chapter 389, Page 672, Acts of the 52nd Legislature of Texas, 1951 3

Page

Acts of the Second Called Session of the Forty-second Legislature of Texas, 1931, Chapter 32, Page 53 . . . 5

Constitution of Texas, 1876, Article VIII:

Section 1 . . . 5
Section 1-a (An Amendment adopted in 1948 and printed at page XXXVI, General and Special Laws, Fifty-first Legislature of Texas, 1949) 3
Section 6 . . . 5
Section 9, as amended 1907, and as amended 1944 . . . 5

Constitution of the United States, Fourteenth Amendment . . . 2

Local and Special Laws of the Second Called Session of the Forty-first Legislature of Texas, Chapter 13, Pages 22, et seq. . . . 4

Minutes of the State Automatic Tax Board . . . 4

Revised Statutes of Texas, 1925:

Article 7041 . . . 5
Article 7043, as amended . . . 5

Texas Reports, Volume 126, Page 509 (191 S.W. 2d 667) . . . 4

Texas Rules of Civil Procedure, Rule 483, as amended by the Supreme Court of Texas, 1945 . . . 7

United States Code, Title 28, Section 1257(2) . . . 9

BLEE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL.,

Appellants,

vs.

EMORY BAY, ET AL.,

Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT GALVESTON, TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants, Guy E. Foster, John L. Francklow, L. R. W. Hall and L. P. Dyer submit their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas in Cause No. 12,518 on its docket.

THROUGH POOR COPY

Opinion Below

The trial judge filed no opinion. The opinion of the Court of Civil Appeals is reported at 255 S. W. 2d 898, and a copy is attached hereto as Appendix A.

Question Presented

The Texas legislature appropriated to Brazos River Conservation & Reclamation District not exceeding $309,000 per year which for 22 years (expiring 1957) might be collected within ten named counties as the proceeds of the state property tax levied uniformly throughout the entire State for its general revenue purposes. Thereafter by constitutional amendment the tax was abolished, with provision that in those areas "of the State from which tax donations have heretofore been granted" the tax should be continued at the maximum rate "for the duration of such donation, or until all legal obligations heretofore authorized by the law granting such donation or donations shall have been fully discharged * * *."

The tax having been abolished as to all others of the original class, does the provision singling out those properties in Grimes County and other areas from which "tax donations" had been made, and subjecting them to continued taxation, deny to appellants (as owners of properties sought thus to be taxed) the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States? *

---

* The second point raised in the Assignment of Errors is also presented. The Question Presented stated above sets forth the major issue.

Statutes Involved [1]

Section 1-a, Article VIII of the Constitution of Texas, (an amendment adopted in 1948 and printed at page xxxvi, General and Special Laws, 51st Legislature of Texas, 1949) is here involved, along with the enabling legislation adopted thereunder, viz., section 10(a) of Chapter 464, page 849, 853, Acts of the Regular Session of the 51st Legislature of Texas, 1949, as amended by Chapter 389, page 672, Acts of the 52nd Legislature of Texas, 1951. Both are copied in full as Items 1 and 2 respectively of Appendix B attached.

In pertinent part, Section 1-a of Article VIII is as follows:

> "Sec. 1-a. From and after January 1, 1951, no State ad valorem tax shall be levied upon any property within this State for general revenue purposes. * * *
>
> "Provided that in those counties or political subdivisions or areas of the State from which tax donations have heretofore been granted, the State Automatic Tax Board shall continue to levy the full amount of the State ad valorem tax for the duration of such donation, or until all legal obligations heretofore authorized by the law granting such donation or donations shall have been fully discharged, whichever shall first occur; * * *."

Statement

Appellants are owners of properties in Grimes County, Texas. In each of the years since 1951, the State of Texas has imposed against their properties an ad valorem tax "for general revenue purposes" which is limited to properties within Grimes County and fewer than twenty-seven

---

[1] Besides the statutes set out under this heading, several other enactments form the background for the present controversy. The statutes hereunder are those whose validity is the issue of this case. The pertinent statutes other than those challenged by this suit are mentioned below in the "Statement".

D THROUGH POOR COPY

other counties,[2] whereas (by virtue of the provisions of Section 1-a of Article VIII above copied) the tax is no longer imposed within the other 226 counties of Texas.

The properties as to which the tax has been continued since 1951 are those (within the intendment of Section 1-a of Article VIII) located within areas from which "tax donations" had been "granted" by the Legislature prior to adoption of the constitutional amendment in 1948, and wherein the term of the appropriation has not expired.

The "tax donation" on account of which the state tax is continued on properties in Grimes County is an appropriation made to the Brazos River Conservation and Reclamation District[3] in 1935. (Chapter 368, p. 1527, Acts 1st Called Session 44th Legislature of Texas; copied in pertinent part as Item 3, Appendix B hereof.) At that time the

---

[2] Excerpts from the Minutes of the State Automatic Tax Board levying the tax for each of the years 1951, 1952 and 1953 and designating the areas within which the tax is imposed are copied respectively as Items 1, 2 and 3 of Appendix "C" attached hereto.

[3] The District was established in 1929 by Chapter 13, Local and Special Laws of the 2nd Called Session of the 41st Legislature of Texas, pages 22, et seq. The act created the District "as a governmental agency, a municipality, body politic and corporate • • •" vested with powers relating to "the control, storing, preservation and distribution to all useful purposes of the storm and flood waters of the Brazos River and its tributary streams: • • •." Its permanent boundaries embraced all lands lying within the watershed of the Brazos River and its tributary streams as defined by written course and distance calls prepared by the State Board of Water Engineers, excepting such lands within the watershed as lay within Freestone, Leon and Madison Counties. (Sec. 5, Chapter 13, as amended by Chap. 5, Acts of the 1st Called Session, 42nd Legislature of Texas). Within the permanent boundaries of the District (outlined on map, Plaintiffs' Exhibit 7) are included all or parts of sixty-five Texas counties. Roughly the western half of Grimes County is included within the District, as shown by the Plaintiffs' Exhibit 8. The lengthy statutes establishing the District are not copied in the Appendix, as the powers of the District and of its Board of Directors are not material to the present controversy. For enumeration of the general powers conferred on the District, see Sec. 3 of Chapter 13 as amended by Chapter 19, page 56, Acts 44th Legislature, 1935 (copied at length in 126 Texas Reports at 509, 191 S. W. 2d at 667).

Constitution of Texas authorized the Legislature to impose equally and uniformly on all taxable properties within the State an ad valorem tax for general revenue purposes, not exceeding the annual rate of 35¢ per $100 of assessed valuations.[4]

By the "tax donation" act of 1935 (Item 3, Appendix B) the legislature "donated and granted" to the District "• • • all of the State ad valorem taxes collected for general revenue purposes" from properties within Grimes and nine other counties,[5] during the period of twenty years from September 1, 1935.[6] The act limited the annual total of funds appropriated to the District to a maximum of $309,000, and further provided that the amount should be limited to such sum each year as the state's general revenue tax rate for the current year would have produced in each of the ten counties severally upon the assessed valuations of properties within each such county for the year 1934. The appropriation was subject to the District's obtaining certain

---

[4] *Texas Constitution*, 1876, Art. VIII, sec. 1; *ibid.*, sec. 9, as amended 1907, and as amended 1944. Enabling legislation, constituted the Governor, the Comptroller of Public Accounts and the State Treasurer as the "State Automatic Tax Board" (Art. 7041, Rev. Stats. of Texas, 1925) and provided that the Board should calculate and impose annually such a rate of tax for general revenue purposes as would supply the deficiency (plus twenty per cent) between the current appropriations against the state's general revenue fund, and its anticipated balances and receipts from other sources. (Art. 7043, Rev. Stat. of Texas, 1925, as amended by Chapter 32, p. 53, Acts of the 2nd Called Session of the 42nd Legis., 1931).

[5] The other counties are: Austin, Brazoria, Burleson, Fort Bend, Waller, Washington, Brazos, Milam and Robertson.

[6] Appropriation of "tax proceeds" before receipt into the treasury was apparently resorted to by the Legislature to avoid the two year limit placed upon appropriations of money "drawn from the Treasury" by Sect. 6 of Art. VIII of the Texas Constitution. See, *City of Aransas Pass* v. *Keeling* (1923) 112 Tex. 339, 247 S.W. 817, 820, and *Brazos River Conservation & Reclamation District* v. *McCraw* (1936) 126 Tex. 506, 91 S.W. 2d 665, where appropriations drawn in the form of "tax donations" for terms of twenty years were sustained.

grants or loans of funds, but the conditions are not material here, since the District satisfied the conditions stated in the act, and appropriation became effective.

The term of the appropriation was extended for two additional years in 1947, the funds granted for the second year being limited to "only one-fourth (¼) as much of the taxes as is allocated" for the year of the additional term. (Chapter 457, p. 1071, 1072, Acts Regular Session 50th Legislature).[7]

Beginning in 1935 and continuing through 1945, the State of Texas levied each year upon all taxable properties within its limits an *ad valorem* tax for general revenue purposes at the rate of 35¢ per $100 of assessed valuations. A like rate of the tax was imposed in 1947, and in 1949 and 1950 the rate was 30¢ per $100 of assessed valuations. In each of those years, the sum of $309,000 was paid over to the District out of the proceeds collected from such levies within Grimes County and the other nine counties named in the "tax donation" act of 1935. The State of Texas levied no property tax for general revenue purposes in 1946 and 1948, and in those two years only the sums collected within the ten counties as delinquent general revenue taxes on property were paid over to the District, but the amounts were less than the annual maximum of $309,000 appropriated to the District.

While appellants' properties (excepting some of the properties owned by Francklow and Dyer) are situated wholly outside of the boundaries of the District, the funds appropriated and paid over to the District prior to 1951 were the proceeds of the tax "for general revenue purposes" imposed alike on all taxable properties within the State, and no separate, special or different tax was imposed upon the properties within the ten-county area in favor of the Dis-

[7] Copied in part as Item 7, Appendix B.

trict, or to support the appropriation made to the District. The validity of the taxes levied upon appellants' properties prior to 1951 is conceded, and is in no wise involved.

In 1951, however, pursuant to Section 1-a of Article VIII and the enabling legislation thereunder, the State assumed to impose a tax "for general revenue purposes" of 30¢ per $100 upon properties within the ten-county area, including Grimes County, and in certain other areas from which other "tax donation" appropriations had been made, but laid no such tax upon properties in the remaining 226 counties. As to properties in the ten counties named in the 1935 act, the tax was also continued in 1952 and in 1953, and the statutes provide for continuance of the tax for the full period of the donation to the District. (Subsec. 4, Sec. 10(a) of Chapter 464, Acts 51st Legis., 1949. (See Appendix B, Item 2). Taxes for 1951 and 1952 have been paid under protest by appellants. Enforcement of payment of the 1953 taxes is imminently threatened.

Appellants, as owners of properties situated outside of the District in Grimes County, Texas, brought this suit against the appropriate tax officials in the state's district court in Grimes County, to restrain the levying and collection of the state tax "for general revenue purposes" for the years 1951 and following, for declaratory judgment and other relief. A number of Texas counties intervened as defendants. The trial court entered judgment that appellants take nothing by their suit. The Court of Civil Appeals affirmed the judgment, holding that the statutes imposing the tax are valid, and overruled appellants' motion for rehearing. Appellants then filed application for writ of error in the Supreme Court of Texas; that Court ordered the application "Refused, no reversible error",[8] and likewise

---

[8] Rule 483 of the Texas Rules of Civil Procedure, as amended by the Supreme Court of Texas 1945, provides that "• • • In all cases where

denied appellants' motion for rehearing, which exhausted appellants' remedies in the state courts.

By this appeal, appellants seek review of the decision and judgment of the Court of Civil Appeals sustaining the validity of Section 1-a of Article VIII of the Constitution of Texas and of Section 10(a) of Chapter 464, Acts of the 51st Legislature (as amended by Chap. 389, Acts, 52nd Legis.) against their claim that the statutes deny them the equal protection of the laws in violation of the Fourteenth Amendment by providing for the continued taxation "for general revenue purposes" of their properties (and others "from which tax donations" had been made) after the tax had been abolished as to all others of the class.

Jurisdiction

Appellants in due time made application to the Supreme Court of Texas for writ of error to review the decision of the Court of Civil Appeals. On June 3, 1953, the Supreme Court ordered the application "Refused, no reversible error", and denied appellants' motion for rehearing on July 15, 1953.

Because the Supreme Court of Texas refused to grant appellants' application for writ of error, the decision of the Court of Civil Appeals is that of the highest state court in which a decision could be had in this case. A petition for appeal to the Supreme Court of the United States was presented to and allowed by the Chief Justice of the Court of Civil Appeals on September 30, 1953.

The jurisdiction of the Supreme Court of the United States to review by appeal the decision of the Court of

---

the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No reversible Error.' • • •"

Civil Appeals herein is conferred by Title 28 U. S. C., Section 1257(2). The following decisions sustain the Supreme Court's jurisdiction of this appeal: *United Gas Public Service Company* v. *Texas* (1937) 301 U. S. 667; *Adam* v. *Saenger* (1938) 303 U. S. 59, 61; *Bacon* v. *Texas* (1895) 163 U. S. 207, 216; *Sullivan* v. *Texas* (1907) 207 U. S. 416, 422; *Norfolk Turnpike Company* v. *First National Bank* (1912) 225 U. S. 264, 267-269.

That a state constitutional provision challenged as invalid because an infringement of the Fourteenth Amendment is a "statute" of the state within Section 1257(2) is sustained by *Adamson* v. *People of the State of California* (1947) 332 U. S. 46, 48 (footnote 1). See also, *King Manufacturing Company* v. *Augusta* (1928) 277 U. S. 100, 103.

Manner in Which the Federal Question Was Raised

At every stage of the proceedings in the state courts, appellants challenged the validity of Section 1-a of Article VIII of the Texas Constitution, and of its enabling act section 10(a) of Chapter 464 as amended, upon the ground that the taxes imposed by those statutes denied appellants the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The question was raised by the Petitions filed by plaintiffs-appellants in the district court, in their briefs and motions in the Court of Civil Appeals, and in their application for writ of error and in their motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals in its opinion sets out "Point One" of appellants' briefs in that Court, whereby the validity of the statutes was there challenged by appellants. The Court of Civil Appeals further expressly recognized in its opinion that the case was one resting "upon the claim of violation of the Fourteenth Amendment to the Constitution of the United States only."

This Court will accept the recognition by the Court of Civil Appeals that the constitutional question here presented was properly raised in the State courts. *Charleston Federal Savings and Loan Association* v. *Alderson* (1945) 324 U. S. 182, 185; *Home Insurance Company* v. *Dick* (1930) 281 U. S. 397, 407.

The Federal Question Is Substantial

A. *This is a "test" case which will determine whether hundreds of taxpayers are subject to the taxes imposed by the challenged statutes.*

This case was brought by appellants as property owners in Grimes County, Texas, to test the validity of Section 1-a of Article VIII of the Texas Constitution, and Section 10(a) of Chapter 464, page 849, Acts of the 51st Legislature as amended by Chapter 389, Page 672, Acts of the 52nd Legislature, insofar as those statutes make provision for continued taxation of properties in Grimes County and other areas from which "tax donations" had been granted by the Legislature, while abolishing the tax as to properties elsewhere in the State.

Appellants are but four of the more than five thousand taxpayers in Grimes County, Texas, and as is apparent from the statement hereinabove made, each of those taxpayers is directly affected by the outcome of this litigation. In addition, the owners of property in the other nine counties named in the tax donation act of 1935 are directly concerned.

The question presented is therefore one which is substantial in the sense that its answer is determinative of the liability of thousands of taxpayers to the taxes which the challenged statutes impose.

B. *The "classification" employed by the challenged statutes for continuing the state tax upon certain properties, while abolishing the tax as to all others of the original class, bears no proper or reasonable relation to the object of the legislation.*

This Court has previously had occasion to say that the restraints of the Fourteenth Amendment of the Constitution of the United States are as applicable to the powers exerted by the State through provisions of its constitution as to its other legislative acts. *Williams* v. *Bruffy* (1877) 96 U. S. 176, 183; *King Manufacturing Company* v. *Augusta* (1927) 277 U. S. 100, 103; *Adamson* v. *People of State of California* (1947) 332 U. S. 46, 48. The validity of Section 1-a of Article VIII of the Texas Constitution and of the enabling legislation adopted under it are thus subject in common to these limitations.

It likewise is settled that the equal protection clause applies to the exercise of the state's power of taxation. *Louisville Gas Company* v. *Coleman* (1928) 277 U. S. 32, 37; *Hopkins* v. *Southern California Telephone Company* (1928) 275 U. S. 393, 403; *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison* (1937) 301 U. S. 459, 461; *Hillsborough* v. *Cromwell* (1945) 326 U. S. 620, 623.

The state's right to classify for purposes of taxation is undoubted, but "* * * *mere* difference is not enough * * *" to sustain discriminations. *Louisville Gas Company* v. *Coleman*, 277 U. S. at 38. To avoid conflict with the Fourteenth Amendment, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation * * *." *Royster Guano Company* v. *Virginia* (1920) 253 U. S. 412, 415.

Since by reason of stated differences the statutes in controversy restrict the tax which they impose to a few only of the original class formerly subjected to its burdens, it is settled that the enactments cannot stand if "the statutory discrimination has no reasonable relation to these differences." *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison*, 301 U. S. at 463.

(1) *The differences employed to limit the tax to specified geographical areas are not reasonably related to the stated object of raising funds "for general revenue purposes" of the state.*

The object of the tax, as stated in the challenged statutes, is the raising of funds "for general revenue purposes" of the state.

Where the state undertakes to raise revenue for the general support of the government, the burden is one which addresses itself to the state as a whole. A tax for such purpose must apply to all within the limits of the taxing power who are similarly situated, else the statute violates the standards of equal treatment enjoined by the Fourteenth Amendment by subjecting some of the class "• • • to taxes not imposed on others of the same class." See, *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623. Where ownership of property is the classification employed for imposing a state tax for the general support of the government, as is the case here, the same basic concepts demand that the exaction apply to all properties of the class, wherever situated within the state. To justify limitation of the tax to a smaller area, there must exist differences which mark out that area and justify its exceptional treatment for some reason over and above geographical location alone. Mere geographical distinctions neither imply nor import such differences as justify disparate tax treatment by the state, and hence are not sufficient *per se* to sustain discrimina-

tions in taxation to raise revenue for general state purposes.

In the instant case, the only basis of selection (other than geographical location) which the challenged statutes employ is that the areas sought to be taxed are those from which unexpired general revenue "tax donations" (within the meaning of Section 1-a of Article VIII of the Texas Constitution) had been made by the legislature prior to 1948. The employment of this most unusual device for distributing tax burdens brings first to mind the observation of this Court that "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 38.

In the second place, it is clear that the circumstance that the legislature by the 1935 "tax donation" act had promised or appropriated to the Brazos District whatever sums might be collected during the succeeding twenty years within Grimes County as the proceeds of the statewide property tax for general revenue purposes, furnishes no reasonable basis of difference upon which to continue the tax upon properties in Grimes County after abolition of the tax as to all others of the original class.

It should be held in mind that the 1935 "tax donation" act (Chapter 368, p. 1527, Acts 1st Called Session 44th Legis.) did not assume to impose upon properties in the ten-county area (including Grimes) a separate tax, or a different tax, from that levied and imposed on all other taxable properties within the State of Texas. Indeed, it levied no taxes at all. It merely directed the *use* to be made of proceeds "collected" within the ten named counties from any levy made by the state for general revenue purposes during the term of years therein specified.

The fact that appellants owned lands within Grimes County but outside of the District afforded no ground for

complaint on their part that the 1935 act discriminated against them, for it laid no tax upon them, nor did it attempt to impose upon their lands any burden not common to lands wherever situated within the State. The appropriations contained in the act being for a public purpose of the state,[9] appellants could not have assailed the validity of the non-discriminatory, statewide property tax, even had they assumed to prove not only that they were not benefited by the expenditure, but that it was actually detrimental to them. *New York Rapid Transit Corporation* v. *City of New York* (1938) 303 U. S. 573, 584; *Carmichael* v. *Southern Coal and Coke Company* (1937) 301 U. S. 495; *Nashville, C. & St. Louis Ry.* v. *Walters* (1934) 294 U. S. 405, 429-30. With equal validity, the legislature in 1935 could have appropriated to the District the proceeds of the same state tax which might be collected upon properties within any other ten named counties in Texas, or upon the properties of ten named persons or corporations. In the latter event, the named persons or corporations could not have complained of the appropriation, nor could they have challenged the non-discriminatory property tax, in view of the decisions last above cited: but the fact of the making of the appropriation would clearly not constitute as to the affected properties a ground of difference whereby the State at a subsequent date could abolish the property tax as to all others of the original class, and continue to tax those properties "from which tax donations" had been granted. Likewise, in the instant case, the fact that the legislature had appropriated to the District such of the proceeds of the state-wide tax as might be collected within Grimes County during a stated term, is not a factual distinction which justifies the continued taxation of properties within that county after

[9] That the grant of funds was for a state purpose was decided by the Supreme Court of Texas in *Brazos River Conservation and Reclamation District* v. *McCraw* (1936), 126 Tex. 506, 91 S.W. 2d 665, 673.

abolition of the tax as to properties elsewhere in the State. Such a basis of selection for all practical purposes is but another way of saying that the tax should be imposed within Grimes County (and certain others) upon the basis of geographical selection alone.

Appellants submit that the basis of "selection" employed in the challenged statutes to limit the tax to certain minor geographical areas of the state, are not reasonably related to the stated object of raising funds "for general revenue purposes" of the State of Texas.

(2) *The Differences Employed by the Statutes to Limit the Tax to Minor Geographical Areas Are Not Reasonably Related to the Object of Raising Funds to Pay Off and Discharge the Appropriation Made by the State to the Brazos River Conservation and Reclamation District*

It is apparent that the Court of Civil Appeals did not attempt to rest its judgment upon the proposition that the "classification" of the challenged statutes is reasonably related to the object of raising funds "for general revenue purposes" of the state. While the opinion of the Court of Civil Appeals is far from clear, its reference to "Grimes and the nine other counties within the area specially benefited", and its citation of such cases as *Hagar* v. *Reclamation District* (1884), 111 U. S. 701, and *Fallbrook Irrigation District* v. *Bradley* (1896), 164 U. S. 112, indicates an effort to relegate the present case to the category of those upholding specific taxes laid with designated areas for particular public improvements. This attempt to fit the instant case into the pigeonhole of the *Hagar* and *Fallbrook* cases necessarily must proceed upon the assumption that because the proceeds of the challenged taxes are dedicated (so far as necessary) to pay off and discharge the appropria-

tion made by the State to the Brazos District, the "object" of the tax is the raising of revenue for such purpose; and since the donee District is an improvement district, ergo, the tax is one for public improvements. But even that is not enough. The argument implicit in the holding must further proceed that (assuming the tax is one for "public improvements") there arises from the fact of the limitation of the tax to a designated area, the presumption that the legislature had (impliedly) found the area specially benefited by the works of the improvement district.

In response, appellants first submit that since the purpose of the act is expressly stated therein, viz., the exaction of a tax "for general revenue purposes", its validity should be judged by the stated object, and that the act will not be sustained by conjecture and hypothesis as to other objectives. "Discriminations are not to be supported by mere fanciful conjecture." *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison* (1937), 301 U. S. 459, 462.

Second, appellants submit that the fact that the proceeds of a tax laid "for general revenue purposes" are appropriated or used for construction of a public improvement, or are donated and granted to a public improvement district, does not change the "object" of the tax in measuring its validity. Cf. *New York Rapid Transit Corporation* v. *City of New York* (1938), 303 U. S. 573, 584 and *Carmichael* v. *Southern Coal and Coke Company* (1937), 301 U. S. 495. The appropriation was for a state purpose, and a proper expenditure from the proceeds of the state-property tax for general revenue purposes, as the Supreme Court of Texas determined in *Brazos River Conservation and Reclamation District* v. *McCraw* (1936), 126 Tex. 506, 91 S. W. 2d 665, 673. The "object" of the tax out of which the appropriation is authorized to be discharged was the same before and after the adoption of Section 1a of Article

VIII of the Texas Constitution; neither the appropriation nor the *object* of the tax to pay it was changed by that statute. The vice of the statute is not its "object", but the attempt to excuse from the burden of the tax certain members of the class while continuing the tax as to others.

Third, even if it be considered that the "object" of the tax is the raising of funds to discharge the appropriation to the Brazos District, it does not follow that the area to which the tax is limited should be "presumed" by the Court to have been selected for taxation on the basis of an implied legislative finding of special benefits accruing to the area so taxed. To demonstrate the fallacy of that premise, let it be assumed that the 1935 tax donation act had granted to the District the proceeds of the state ad valorem tax for general revenue purposes which might be collected within El Paso County, Dallas County and Potter County (Amarillo). As a glance at Plaintiffs' Exhibit 7 will show, these counties are hundreds of miles from each other; none is within the boundaries of the Brazos District, and are a hundred miles or so from the Possum Kingdom dam constructed by the Brazos District in Palo Pinto County.[10] Upon abolition of the tax "for general revenue purposes" elsewhere within the State, could it be said a reasonable inference that the provision continuing the tax in those areas "from which tax donations" had been granted implied the selection of properties in those scattered counties for taxation because of special benefits accruing from the works of the donee improvement district? On the contrary, would not the fact that the properties so taxed were located out-

[10] The illustration is not purely hypothetical, but suggested by House Bill 52, Acts Regular Session 46th Legislature. To assist the City of Corpus Christi in building a seawall, that enactment "donated" to the City the proceeds of the state general revenue levy collectible within seven counties. San Patricio County, adjacent to Nueces (in which Corpus Christi is located) is not included, although Kenedy and Willacy Counties (over a hundred miles away) were named in the act.

THROUGH POOR COPY

side of the boundaries of the improvement district destroy any presumption that the object of the legislation was the taxation of properties specially benefiting from the works of the district? This Court has said that where the legislature establishes an improvement district, defines its boundaries, and commits to it the power to make public improvements, the corresponding grant of power to tax properties *within* its boundaries to defray the costs is by clear implication a finding that the area so included will derive special benefit from the authorized works. *Milheim* v. *Moffatt Tunnel District* (1923), 262 U. S. 55, 58; *Fallbrook Irrigation District* v. *Bradley* (1896), 164 U. S. 112, 174-175. By the same token, we submit, the legislative action in establishing the Brazos River Conservation and Reclamation District was a corresponding finding that lands lying *outside* the fixed boundaries are not specially benefited by its works.

In this connection, the Court is invited to recall that the challenged statutes do not provide for imposition of taxes upon properties within the Brazos District, or in reference to its boundaries. The tax is levied upon properties within the boundaries of ten counties (named in the 1935 "tax donation" act), and the fact that any such properties are not within the boundaries of the Brazos District does not except them from taxation. Appellants are owners of some of these properties, which, though outside of the District, are subjected to the challenged taxes, and while these properties are not so far outside of the boundaries of the District as would be properties in El Paso County or Potter County, the test is hardly one to be measured in some fixed number of miles.

Conclusion

Enough has been said to demonstrate that the federal question which this cause presents is substantial. The

areas sought to be subjected to the challenged levies were not picked to bear the burden on any basis having substantial and reasonable relation to a state ad valorem tax for general revenue purposes. Instead, they were expressly so selected upon the basis that they were "those counties or political subdivisions or areas . . . from which tax donations" had been granted. For the reasons hereinabove stated, it is apparent that the purported classification imposes special burdens upon appellants and other property owners in Grimes County and other such areas, from which others of the same class within the limits of the taxing power are exempt. Wherefore we submit that the challenged levies constitute taxation of property in an unequal and arbitrary way, and that the purported classification is void because it denies to appellants the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

HENRY H. BROOKS,
GAYNOR KENDALL,
WALTER R. KOCH,
Counsel for Appellants.

HULON H. HALL,
BILL PALMOS,
Of Counsel.

APPENDIX "A"

OPINION OF THE COURT OF CIVIL APPEALS

No. 12,518

GUY E. FOSTER, et al., *Appellants,*

vs.

EMORY BAY, et al., *Appellees*

Appeal from the District Court of Grimes County

This is an appeal from a judgment of the District Court of Grimes County, Texas, denying a permanent injunction, a declaratory judgment, and all other relief sought by appellants, four land-owning taxpayers of Grimes County, suing for all others similarly situated, against the appellees, the State Automatic Tax Board and others, acting pursuant to the authority allegedly conferred upon them by Article VIII, Section 1a, of the Texas Constitution, and Article 7048a, Vernon's Civil Statutes, as amended.

Under this provision of the Constitution and the enabling statute, such Board authorized the levy, in 1951, of a State ad valorem tax, of 30¢ per $100.00 valuation in Grimes County, and the other nine counties, whose taxes had been donated or "remitted," to the Brazos River Conservation and Reclamation District, for the purpose of aiding in the construction of dams on the Brazos River, and particularly what was called the "Possum Kingdom Dam."

Pursuant to the same authority, no State ad valorem tax was levied in 1951 in the counties of the State, from which no such donation, or remission, of taxes had been made by the Legislature.

At the trial, Anderson and 53 other Texas counties intervened on the side of the defendants so sued, and are now also Appellees in this Court.

Seeking a reversal, the appellants present two points of error, which, in boiled-down substance, were these:

Point One, with its subsidiaries A. and B., being to this effect:

Point One

"The challenged tax levies and the enactments purporting to authorize them deny to Appellants the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

A

"The fact that the Legislature had previously allocated to the Brazos District not exceeding $309,000 per year of the proceeds which for a fixed term might be collected within Grimes County and nine others from the property tax imposed uniformly throughout the State for general revenue purposes, was not a valid basis of classification, upon abolition of the tax elsewhere within the state, for continued taxation by the State of the properties in said ten counties during the unexpired term of the allocation.

B

"The challenged levies cannot be sustained upon the assumption that they are imposed upon properties deriving special benefits from the uses to which the proceeds of the levies are devoted."

Point Two

"The 'freezing' of the sums allocated to the Brazos District from the statewide levies collected within each of the ten named counties, to an amount based on their respective 1934 valuations, results in gross discrepancies among them in the rate of tax now necessary to raise the specified sum within each county, and is an invalid basis of apportionment even for special assessment."

Neither of these presentments, it is determined, should be sustained.

The establishment and operation of what is termed the "Brazos River Conservation and Reclamation District of Texas", created by Chapter 13, Local and Special Laws, 41st Legislature, 2nd Called Session, which became effective October 2nd, 1929 (see Art. 8194, V. A. T. S., note), resulted in litigation long before the cause now at Bar originated, which was determined by the Supreme Court of

Texas on February 5, 1936, in Cause No. 7021, on its docket, styled Brazos River Conservation and Reclamation District v. McCraw, et al., which was reported in the Southwestern Reporter, Second Series, Vol. 91, at page 665.

In the cited case our Supreme Court, in full review of the nature and objective of that body, held it not to be obnoxious to the objections raised by the Attorney General of Texas to its legality in a large number of objections he had made in support of his refusal to approve a proposed bond issue of $3,600,000.00, such District sought to issue in furtherance of the objectives of its creation. In other words, in the McCraw case, the appellee authority was vindicated by the Supreme Court of any violation of the Constitution of Texas, and the appellees urge that that decision —in its reaches—in effect controls the present cause also, despite the fact that it rests upon the claim of violation of the 14th Amendment to the Constitution of the United States only.

This Court is constrained to agree with the appellees; wherefore, it holds that the decision in that cause is binding upon the courts of this State, at least, under the principle of stare decisis.

That ancient and honorable doctrine is still extant in Texas, and it is thought the application of it herein to the Supreme Court's opinion in the McCraw case will be an appropriate recognition. Benavides v. Garcia, 290 S. W. 739; Rosetti v. Benavides, 195 S. W. 208, error refused; Lyle v. State, 80 Tex. Crim. 606, 193 S. W. 680; Short v. W. T. Carter & Bro., 133 Tex. 202, 126 S. W. 2d 953; W. T. Carter & Bro. v. State, 139 S. W. 2d 661; Neilson v. Schoellkopf, 122 S. W. 2d 281, error refused; American National Ins. Co. v. Warnock, 143 S. W. 2d 624, error dismissed, judgment correct; Daniel v. Kittrell, 188 S. W. 2d 404, error refused. w. o. m.

The undisputed facts in this record show that the very ten counties—including Grimes, where the four appellants' lands lay—were located in the very vortex of the recurring floods the Supreme Court held to constitute a public calamity; it further declared that such situation lay at the base of the original Act of the Legislature so remitting the

State ad valorem taxes from Grimes and the other nine counties so characterized by the Supreme Court, on page 668, of 91 S. W. 2d. That court attached to its opinion a map of the land itself, showing the location within the Brazos River District of the ten remission counties, so referred to, in the shaded portion of such District, which ran down to the Gulf of Mexico; such map showing plainly the boundary lines of the entire District, as well as the exact location of such ten counties therein, including Grimes.

It thus seems to this Court that the Supreme Court has, in the McCraw case, in necessary effect at any rate, upheld the constitutionality of the original Act so remitting the State ad valorem taxes from Grimes, and the other nine counties in the Brazos River Reclamation District; if so, as this Court views that result, this appeal must fail.

In sum, it holds, First: that it was competent for the Texas Legislature, without violation of the Federal Constitution in its 14th Amendment, to finance the public improvements undertaken by the Brazos River District to stop pre-existing public calamities, caused by such recurring floods in that area, to donate, grant, or turn over, taxes collected from Grimes and the nine other counties within the area specially benefited by the dams projected therein. Article VIII, Section 1-a, of the Texas Constitution, and Article 7048a, Vernon's Civil Statutes, as amended; County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Hagar v. Reclamation Dist., 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569; Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 L. Ed. 763; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; Williams v. Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. Ed. 1047; Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist., 256 U. S. 129, 41 S. Ct. 404, 65 L. Ed. 859; Garland Co. v. Filmer, 1 F. Supp. 8 (N. D. Cal. 1932); Tom Green County v. Moody, 116 Tex. 299, 289 S. W. 381.

Second, as recited supra, the decision of the Supreme Court in Brazos River District vs. McCraw, cited supra, is authority for the affirmance of the trial court's judgment in this case, because, presumably at least, that court examined, in construing such remission statute, what was pre-

sumed by the Legislature in passing such Act—that Grimes, and the other nine remission counties, had been specially benefited by the projected dams by the Reclamation District—and held such presumed results to be correct. Brazos River Conservation and Reclamation District v. McCraw, 126 Tex. 506, 91 S. W. 2d 665; Owens v. Tedford, 114 Tex. 390, 269 S. W. 418; McCullough v. McCullough, 120 Tex. 209, 36 S. W. 2d 459; Teat v. McGaughey, 85 Tex. 478, 22 S. W. 302; Wooten v. Rogan, 96 Tex. 434, 73 S. W. 799; West v. Terrell, 96 Tex. 548, 74 S. W. 903; Love v. Wilcox, 119 Tex. 256, 28 S. W. 2d 515.

Further discussion is deemed unnecessary, in the realization that this Court is one of intermediate jurisdiction, and that its determination herein may also reach for a review in the same court that rendered the McCraw opinion, supra.

The trial court's judgment will be affirmed.

Affirmed, Associate Justice Cody not sitting.

(S.) Geo. W. Graves,
Associate Justice.

Judgment rendered, and opinion filed February 26, 1953.

APPENDIX "B"

Item 1

Sect. 1-a, Art. VIII of the Constitution of Texas (Adopted Election November 2, 1948, Printed at Page xxxvi, General and Special Laws, 51st Legis. of Texas)

Sec. 1-a

From and after January 1, 1951, no State ad valorem tax shall be levied upon any property within this State for general revenue purposes. From and after January 1, 1951, the several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes, except the first Three Thousand Dollars ($3,000) value of residential homesteads,

not to exceed thirty cents (30¢) on each One Hundred Dollars ($100) valuation, in addition to all other ad valorem taxes authorized by the Constitution of this State, provided the revenue derived therefrom shall be used for construction and maintenance of Farm to Market Roads or for Flood Control, except as herein otherwise provided.

Provided that in those counties or political subdivisions or areas of the State from which tax donations have heretofore been granted, the State Automatic Tax Board shall continue to levy the full amount of the State ad valorem tax for the duration of such donation, or until all legal obligations heretofore authorized by the law granting such donation or donations shall have been fully discharged, whichever shall first occur; provided that if such donation to any such county or political subdivision is for less than the full amount of State ad valorem taxes so levied, the portion of such taxes remaining over and above such donation shall be retained by said county or subdivision. Sec. 1-a, Art. 8, adopted election Nov. 2, 1948.

APPENDIX "B"

Item 2

Sect. 10(a) of Chap. 464, page 849, 853, Acts of the 51st Legislature of Texas, 1949 (Also printed as Sect. 10(a) of Art. 7048a, Vernon's Annotated Civil Statutes of Texas, as amended by Chap. 389, p. 672, Acts 52nd Legis., 1952)

Sec. 10. (a) (1) Beginning in the year 1951 and each year thereafter the State Automatic Tax Board created by Article 7041 of the Revised Civil Statutes of Texas, 1925, shall cause to be levied annually in each county, political subdivision or other defined area, the full thirty cents (30¢) State ad valorem tax for general revenue purposes, the proceeds of which heretofore were donated and granted by the Legislature to certain counties, political subdivisions or other defined areas for the purpose of carrying out and per-

THROUGH POOR COPY

forming actions of preventing calamities, improving, protecting and reclaiming certain areas for and on behalf of the State as more fully declared in each applicable law or laws making such donation or grant and said Board shall continue to levy such tax at said rate in each such designated area until the bonds or other obligations of said areas authorized or incurred in connection with the performance of such action on behalf of the State shall have been fully paid or discharged or until the expiration date of such donation or grant as may be determined from the law or laws making such grant or donation, whichever shall first occur.

(2) The provisions of Article 7043, Revised Civil Statutes of Texas, 1925, as amended setting up a formula to govern said Board in ascertaining the rate of tax to be levied for state general revenue purposes shall not apply from and after January 1, 1951. The rate of tax to be levied after said date shall be thirty cents (30¢) on each One Hundred Dollars ($100) valuation as fixed by the amendment to Section 1-A, Article 8 of the Constitution, as adopted November 2, 1948.

(3) The tax assessors and collectors in each of such Counties shall continue to assess and collect such tax and make the proceeds thereof available to the donees or grantees in the manner provided by the law or laws making each such grant or donation. The moneys thus collected by said tax assessors and collectors and received by such grantees or donees shall be used and accounted for annually as prescribed by the law or laws making such grant or donation.

(4) In those instances where less than the full State general ad valorem tax was granted or donated, the portion of the money collected in excess of the amount donated or granted shall be retained by or paid over to the governing body of the county or political subdivsion from which such tax is collected; and in the event that the amount of State general ad valorem tax granted, donated and collected is in excess of the amount needed to pay off and fully discharge all legal obligations authorized by law and which were incurred prior to the adoption of Section 1-a of

Article VIII of the Constitution of Texas, then such excess shall be retained by or paid over to the governing body of the county or political subdivision from which such tax is collected; provided, however, that nothing herein shall be construed to limit or impair the right of the Upper Colorado River Authority to receive and fully utilize the full amount of moneys heretofore donated and granted said Authority; and provided further, that nothing in this Act shall apply to, nor in anywise affect, the State general ad valorem tax heretofore granted or donated to the Central Colorado River Authority, the boundary of which is coextensive with that of Coleman County; and provided further, that nothing contained herein shall be construed to diminish or affect any right or authority of the Brazos River Conservation and Reclamation District to receive, obligate or expend the full amount of Three Hundred Nine Thousand ($309,000.00) Dollars each year heretofore donated for the full period of the donation. In the discretion of said governing body such excess shall be used either for the construction and maintenance of farm-to-market roads, or for flood control, only within the county, political subdivision, or defined area from which such tax is collected. The moneys thus retained or paid over shall be fully reported each year to the Comptroller of Public Accounts at the same time such Assessor-Collector makes his annual report as required by law, and the governing body of the county, political subdivision, or defined area thus retaining or being paid such excess money shall likewise report annually to the Comptroller of Public Accounts the sum thus retained or held and the purpose for which it was used. The moneys thus retained or held or declared to be trust funds to be used only for the purpose herein named, and the use thereof for any other purpose shall constitute a misapplication of public money and the person or persons so offending shall be punished as provided for in Article 86 of the Penal Code of the State of Texas.

APPENDIX "B"

Item 3.

Chapter 368, page 1527, Acts 1st Called Session, 44th Legislature of Texas, 1935—(Tax Donating Act)

"Section 1. That for a period of twenty years or for such portion of such period as may be required but not longer and commencing with the fiscal year beginning September 1, 1935, and contingent upon a loan and/or grant and/or allotment from the United States of America of sufficient size to reasonably insure the completion of the construction of such unit or units of such coordinated and completed system of improvements of control over the Brazos River and its tributaries and waters thereof as may be approved by the Board of Water Engineers of the State of Texas, such approval to be certified to the Comptroller of the State of Texas by the Board of Water Engineers, there is hereby donated and granted by the State of Texas to the Brazos River Conservation and Reclamation District, a state agency, created by the Act of the Legislature of the State of Texas, Chapter 13, Special Laws, Second Called Session, 41st Legislature, all of the State ad valorem taxes collected for general revenue purposes upon the property and from persons in the following counties, to-wit: Austin, Brazoria, Burleson, Fort Bend, Grimes, Waller, Washington, Brazos, Milam and Robertson; including the rolling stock belonging to railroad companies which shall be ascertained and apportioned as now provided by law; provided, however, that in no event shall the amount hereby granted exceed in any one year a total sum of Three Hundred Nine Thousand ($309,000.00) Dollars.

Provided, further, that in no event shall such amounts hereby granted and/or donated ever exceed in any one county a sum that would be produced for any current year by the levy of the then current State ad valorem tax for general revenue purposes on the valuations of said county as shown by the Comptroller's records for the year, 1934, and all sums collected in excess of such amount shall con-

tinue to go into the General Revenue Funds of this State. * * * "

APPENDIX "B"

Item 4.

Act extending term of grant of State ad valorem taxes to certain Public Agencies (Chap. 457, p. 1071, Acts Regular Session 50th Legislature, 1947)

Whereas, In accordance with applicable provisions of the Constitution the Legislature, in the manner, to the extent, and for the terms prescribed, in the Act applicable respectively to each, has heretofore allocated to certain counties, cities, districts, and political subdivisions (hereinafter sometimes called "Public Agencies"), part of the ad valorem tax levied and collected by the State for General Revenue purposes, authorized under the Constitution in the maximum rate of thirty-five cents (35c) on the One Hundred Dollars ($100) of taxable property, brief reference to the allocation for each such Public Agency being made as follows:

(a) To Brazos River Conservation and Reclamation District, allocation of all of such tax levied and collected on the property in and on the rolling stock of railroad companies apportioned to the following counties: Austin, Brazos, Brazoria, Burleson, Fort Bend, Grimes, Milam, Robertson, Waller and Washington; provided that the amount to be received by such Public Agency from taxes collected in any of the ten (10) counties for any year shall not exceed the amount which would have been produced for any current year by the levy of the then current State ad valorem tax for general revenue purposes on the valuations of said county as shown by the Comptroller's records for the year 1934, and provided that the maximum amount which such Agency can receive from such grant in any year shall be Three Hundred and Nine Thousand Dollars ($309,000); the allocation being effective for a period of twenty (20) years commencing September 1, 1935; * * *

WHEREAS, Each such Public Agency, in accordance with its respective allocation Act and applicable extensions thereof has heretofore incurred obligations, made commitments or undertaken a construction or maintenance program or has issued bonds, presently outstanding, for the payment of or the accomplishment of which such allocated taxes are pledged; and

WHEREAS, Due to the then excellent condition of the State's General Revenue Fund, under applicable law, the levy of a State ad valorem tax for General Revenue purposes was unnecessary and was not made for the year 1946, resulting in the failure of each such Public Agency to receive any money from such source for such year; and

WHEREAS, Unless some substituted payment is made by the State each Public Agency, which has been heretofore selected by the State either to perform a function and duty of the State or to relieve or avert a calamity then recognized, will suffer embarrassment on its obligations; and

WHEREAS, The State recognizing the probable adverse effect on the State itself of a failure to relieve such embarrassment to its agencies in lieu of a present appropriation for each such Public Agency prescribes this measure of relief:

Section 1. The term during which the allocation of taxes for each such Public Agency is effective under existing law, including its original allocation Act and all extensions thereof, whether or not specifically named in the Preamble to this Act, is extended for two (2) additional years; but for the second year of such extension each such Public Agency shall be and is allocated only one-fourth (¼) as much of the taxes as is allocated to it for the first year of such extension. The additional years during which such tax shall be allocated shall as to each such Public Agency be known as its "Extension Years." The Comptroller of Public Accounts shall make such changes in the records of his office to give effect to this Act, and shall give appropriate written instructions to all officials charged with the duty of collecting such allocated taxes and all officials having the

duty of transmitting the proceeds thereof to such Public Agencies to the end that the object of this Act may be fully accomplished. Each of such Public Agencies are hereby authorized to borrow against the revenues accruing to it from such extension years, or to issue refunding bonds for any maturities of principal and interest, or both, and to pay the expense actually and necessarily spent therefor. * * *

APPENDIX "C"

Item 1.

Minutes of the Automatic Tax Board—July 20, 1951

The Automatic Tax Board met in the office of the Comptroller of Public Accounts on this the 20th day of July, 1951, with the following members present: Robert S. Calvert, Comptroller of Public Accounts; Jesse James, State Treasurer. The Governor was out of the City of Austin and was unable to attend in person. The Honorable William L. McGill, Executive Secretary to the Governor, appeared and represented the Governor.

Section 1-a of Article VIII of the Constitution was read and discussed in connection with Article 7043, Vernon's Civil Statutes. The Board found from the records of the Comptroller's Department that tax donations from the counties and political subdivisions listed below had been granted prior to the adoption of Section 1-a of Article VIII of the Texas Constitution, and that in each of said counties and political subdivisions legal obligations authorized by the act making the donations and which were incurred prior to the adoption of said section of the Constitution have not been fully discharged, and in keeping with the provisions of said section of the Constitution a motion was offered by Robert S. Calvert and seconded by Jesse James, as follows:

1. (a) That the tax for State general revenue purposes for and in the following counties be fixed and the

same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Aransas	Coke	Hildalgo
Austin	Duval	Nueces
Brazoria	Fort Bend	Orange
Brazos	Grimes	Robertson
Brooks	Jim Hogg	San Patricio
Burleson	Jim Wells	Tom Green
Calhoun	Kleberg	Waller
Cameron	Milam	Washington
		Willacy

(b) That the tax for State general revenue purposes in the designated precincts and political subdivisions of the following counties be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Collins (Old Nevada Ind. School Dist.)
Jefferson (Prec. 2 only)
Matagorda (Prec. 3 only)

2. That the tax for public free school purposes be fixed and the same is hereby levied at the rate of thirty-five cents (35¢) on each One Hundred Dollars ($100) valuation;

3. That the tax for Confederate Pensions as fixed by the Constitution be fixed and the same is hereby levied at the rate of two cents (2¢) on each One Hundred Dollars ($100) valuation;

4. That the tax for the College Building Fund be fixed and the same is hereby levied at the rate of five cents (5¢) on each One Hundred Dollars ($100) valuation.

The Comptroller called for votes upon the motion as presented and the motion carried unanimously.

The information concerning legal obligations existing in reference to the donation made to the Dallas County Flood Control District was incomplete, and the meeting recessed,

awaiting this information, until this the 24th day of July, 1951; whereupon the meeting reconvened on July 24, 1951, with the same members present and, having received the information, the Board found that tax donations from the territory comprising the Dallas County Flood Control District had been granted prior to the adoption of Section 1-a of Article VIII of the Texas Constitution and that in such political subdivision legal obligations authorized by the act making the donation and which were incurred prior to the adoption of said section of the Constitution have not been fully discharged, and in keeping with the provisions of said section of the Constitution a motion was offered by Robert S. Calvert and seconded by Jesse James, as follows:

> That the tax for State general revenue purposes for and in the territory comprising the Dallas County Flood Control District be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation;

and upon a vote on said motion the same carried unanimously.

There being no further business, the meeting adjourned.

(S.) Allan Shivers,
Governor.

(S.) Robert S. Calvert,
Comptroller.

(S.) Jesse James,
Treasurer.

The State of Texas,
County of Travis:

I, Robert S. Calvert, Comptroller of Public Accounts in and for the State of Texas, hereby certify that the above and foregoing is a full, true and correct copy of the minutes of the meeting of the Automatic Tax Board which was held in the office of the Governor of Texas on July 20, 1951, and which remain on file in my office.

In testimony whereof I have hereunto set my hand and seal of office of Comptroller of Public Accounts at Austin, Texas, this the 17th day of September, 1953.

(S.) Robert S. Calvert,
(Seal.) *Comptroller of Public Accounts,*
State of Texas.

APPENDIX "C"

Item 2

Minutes of the Automatic Tax Board—July 21, 1952

The Automatic Tax Board met in the office of the Comptroller of Public Accounts on this the 21st day of July, 1952, with the following members present: Honorable Ben Ramsey, Lt. Governor, Acting Governor and presiding (Governor Allan Shivers being out of the State and unable to attend), Robert S. Calvert, Comptroller of Public Accounts, Jesse James, State Treasurer.

Section 1-a of Article VIII of the Constitution was read and discussed in connection with Article 7043, Vernon's Civil Statutes. The Board found from the records of the Comptroller's Department that tax donations to the counties and political subdivisions listed below had been granted prior to the adoption of Section 1-a of Article VIII of the Texas Constitution, and that in each of said counties and political subdivisions legal obligations authorized by the act making the donations and which were incurred prior to the adoption of said section of the Constitution have not been fully discharged, and in keeping with the provisions of said section of the Constitution a motion was offered by Robert S. Calvert and seconded by Jesse James, as follows:

1. (a) That the tax for State general revenue purposes for and in the following counties be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Aransas	Cameron	Robertson
Austin	Coke	San Patricio
Brazoria	Fort Bend	Tom Green
Brazos	Grimes	Waller
Burleson	Milam	Washington
Calhoun	Orange	

(b) That the tax for State general revenue purposes in the designated precincts and political subdivisions of the following counties be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Jefferson (Prec. 2 only)
Matagorda (Prec. 3 only)
Dallas (Dallas County Flood Control District only)

2. That the tax for public free school purposes be fixed and the same is hereby levied at the rate of thirty-five cents (35¢) on each One Hundred Dollars ($100) valuation;

3. That the tax for Confederate Pensions as fixed by the Constitution be fixed and the same is hereby levied at the rate of two cents (2¢) on each One Hundred Dollars ($100) valuation;

4. That the tax for the College Building Fund be fixed and the same is hereby levied at the rate of five cents (5¢) on each One Hundred Dollars ($100) valuation.

The Honorable Ben Ramsey, Acting Governor, called for votes upon the motion as presented and the motion carried unanimously.

The Board unanimously recommends that the 53rd Legislature reduce the levy for Confederate Pensions from two cents (2¢) per One Hundred Dollars ($100) valuation to zero, there being sufficient money in the fund to pay authorized claims for several years.

There being no further business, the meeting adjourned.

(S.) BEN RAMSEY,
Lt. Governor, Acting Governor.
(S.) ROBERT S. CALVERT,
Comptroller.
(S.) JESSE JAMES,
State Treasurer.

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the Minutes of the Automatic Tax Board dated July 21, 1952, as on file in my office.

Given under my hand and seal of office at Austin, Texas, this 31st day of August, 1953.

(S.) ROBERT S. CALVERT,
(Seal.) *Comptroller of Public Accounts.*

APPENDIX "C"

ITEM 3

MINUTES OF THE AUTOMATIC TAX BOARD—July 20th, 1953

The Automatic Tax Board met in the office of the Governor of Texas on this the 20th day of July, 1953, with the following members present: Governor Allan Shivers, presiding; Robert S. Calvert, Comptroller of Public Accounts; Jesse James, State Treasurer.

Section 1-a of Article VIII of the Constitution was read and discussed in connection with Article 7043, Vernon's Civil Statutes. The Board found from the records of the Comptroller's Department that tax donations to the counties and political subdivisions listed below had been granted prior to the adoption of Section 1-a of Article VIII of the Texas Constitution, and that in each of said counties and political subdivisions legal obligations authorized by the act making the donations and which were incurred prior

to the adoption of said section of the Constitution have not been fully discharged, and in keeping with the provisions of said section of the Constitution a motion was offered by Robert S. Calvert and seconded by Jesse James, as follows:

1. (a) That the tax for State general revenue purposes for and in the following counties be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Aransas	Cameron	Robertson
Austin	Coke	San Patricio
Brazoria	Fort Bend	Tom Green
Brazos	Grimes	Waller
Burleson	Milam	Washington
Calhoun		

(b) That the tax for State general revenue purposes in the designated precincts and political subdivisions of the following counties be fixed and the same is hereby levied at the rate of thirty cents (30¢) on each One Hundred Dollars ($100) valuation:

Jefferson (Prec. 2 only)
Matagorda (prec. 3 only)
Dallas (Dallas County Flood Control District only)

2. That the tax for public free school purposes be fixed and the same is hereby levied at the rate of thirty-five cents (35¢) on each One Hundred Dollars ($100) valuation;

3. That the tax for Confederate Pensions as fixed by the Constitution be fixed and the same is hereby levied at the rate of two cents (2¢) on each One Hundred Dollars ($100) valuation;

4. That the tax for the College Building Fund be fixed and the same is hereby levied at the rate of five cents (5¢) on each One Hundred Dollars ($100) valuation.

The Honorable Allan Shivers, Governor, called for votes upon the motion as presented and the motion carried unanimously.

There being no further business, the meeting adjourned.

(S.) ALLAN SHIVERS,
Governor.

(S.) ROBERT S. CALVERT,
Comptroller.

(S.) JESSE JAMES,
State Treasurer.

I, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, do hereby certify that the foregoing is a true and correct copy of the Minutes of the Automatic Tax Board dated July 20, 1953, as on file in my office.

Given under my hand and seal of office at Austin, Texas, this 31st day of August, 1953.

(S.) ROBERT S. CALVERT,
Comptroller of Public Accounts.

(Seal.)

E COPY

FILED
OCT 27 1953
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL.,

Appellants

v.

EMORY BAY, ET AL.,

Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN BEN SHEPPERD,
Attorney General of Texas;
PHILLIP ROBINSON,
Assistant Attorney General;
CHARLES L. BLACK,
CARLOS B. MASTERSON,
CHARLES W. BELL,
Attorneys for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
The question presented	2
The federal question is unsubstantial	2
Further argument is unnecessary	6

Table of Cases Cited

Big Slough Drainage Dist. v. *Board of Comm'rs*, 336 U.S. 957	6, 7
Board of Comm'rs v. *Ohio ex rel. Bowman*, 286 U.S. 526	7
Brazos River Cons. and Recl. Dist. v. *McCraw*, 126 Tex. 506, 91 S.W. 2d 665	5
Chesebro v. *Los Angeles County Dist.*, 306 U.S. 459	3
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112	3
Hagar v. *Reclamation Dist.*, 111 U.S. 701	3
Houck v. *Little River Dist.*, 239 U.S. 254	3
Kansas C. S. Ry. v. *Road Impr. Dist. No. 3*, 266 U.S. 279	3
Martha Bright Farms, Inc. v. *Davis*, 293 U.S. 531	7
Memphis & C. Ry. v. *Pace*, 282 U.S. 241	3
Milheim v. *Moffat Tunnel Impr. Dist.* 262 U.S. 710	7
Miller & Lux, Inc. v. *Sacramento & San Juaquin Drainage Dist.*, 256 U.S. 129	3, 7
Mobile County v. *Kimball*, 102 U.S. 691	2, 3
Mt. St. Mary's Cemetery Ass'n v. *Mullins*, 248 U.S. 501	3
Spencer v. *Merchant*, 125 U.S. 345	3
Valley Farms Co. v. *Westchester County*, 261 U.S. 155	3
Williams v. *Eggleston*, 170 U.S. 304	3

Statutes and Other Authorities Cited

	Page
Vernon's Annotated Civil Statutes of Texas:	
Article 7048a	4
Article 8197f, note	4
Session Laws:	
Acts, 44th Leg., R.S. 1935, ch. 19	4
Acts, 44th Leg., 1st C.S., 1935, ch. 368	4, 6
Acts, 50th Leg., 1947, H.J.R. No. 24	4
Acts, 51st Leg., R.S. 1949, ch. 464	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL.,

Appellants

v.

EMORY BAY, ET AL.,

Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees Robert S. Calvert, Jesse James and Allan Shivers, members of the State Automatic Tax Board, and Brazoria, Brazos, Fort Bend, Milam and fifty other Texas counties, respectfully file this statement in opposition to appellants' statement contending that this Court has jurisdiction upon appeal to review the judgment heretofore rendered in this cause by the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Appellees include herein their motions to dismiss the appeal or, in the alternative, to affirm the judgment of the

Court of Civil Appeals. Both motions are based on appellees' conviction that the equal protection question urged by appellants as the only ground for reversal needs no further argument because it has been plainly foreclosed and determined against appellants by prior decisions of this Court.

The Question Presented

May the Texas Legislature, consistent with the equal protection of the law guaranteed by the Fourteenth Amendment, define a taxing district composed of Grimes and nine adjacent counties which had previously suffered most from floods on the Brazos River and authorize taxation in those counties only for the support of flood control works projected, supervised and coordinated by a master district embracing the entire watershed?

The Federal Question Is Unsubstantial

For more than seventy years this Court has uniformly held that when public works are authorized by state law it is for the state legislature to determine the manner of financing such improvements, and that where the improvements are comparable in scope to those built and projected by the Brazos River Conservation and Reclamation District the state legislature "may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure." See *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1880).

When (as in the present case) a state legislature has taken the latter course, has designated or defined a lesser area than the whole state and has placed the entire financial burden thereon, this Court has consistently rejected taxpayers' complaints based on the Equal Protection Clause

except in very rare instances when the record so clearly disproved special benefit to the defined area that the legislature's action could be characterized as "palpably arbitrary and a plain abuse" of legislative power. *Houck* v. *Little River Dist.*, 239 U. S. 254, 262 (1915).

The decisions which most clearly foreclose the question raised by appellants are: *Chesebro* v. *Los Angeles County Dist.*, 306 U. S. 459 (1939); *Memphis & C. Ry.* v. *Pace*, 282 U. S. 241 (1931); *Kansas C. S. Ry.* v. *Road Impr. Dist. No. 3*, 266 U. S. 379 (1924); *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155 (1923); *Mt. St. Mary's Cemetery Ass'n* v. *Mullins*, 248 U. S. 501 (1919). See also the decisions referred to and relied upon by the Court of Civil Appeals.[1]

These decisions show that equal protection arguments founded on matters of unusual form or unusual language in the state legislation complained of, though frequently advanced, have not met with success in this Court. As stated in the *Chesebro* opinion:

> ". . . where, within the scope of its power, the legislature itself has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive. . . .
>
> "The legislature need not adopt any form of statement or finding for, in the enforcement of restraints imposed by the federal constitution upon the power of states to assess and collect taxes, this Court regards the *substance* of their enactments as controlling rather than mere forms of expression employed." (306 U. S. at 464) (Emphasis added throughout this Statement).

---

[1] *County of Mobile* v. *Kimball*, 102 U.S. 691 (1880); *Hagar* v. *Reclamation Dist.*, 111 U.S. 701 (1884); *Spencer* v. *Merchant*, 125 U.S. 345 (1888); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896); *Williams* v. *Eggleston*, 170 U.S. 304 (1897); *Miller & Lux, Inc.* v. *Sacramento & San Juaquin Drainage Dist.*, 256 U.S. 129 (1921).

The substance of the Texas legislation authorizing collection of the challenged 30¢ per $100 valuation tax in Grimes County, until the outstanding obligations of the Brazos District are retired in 1957, is identical in effect with the substance of the various legislative acts heretofore sustained as against Equal Protection Clause arguments in the line of cases of which the above are representative. In each such case a defined geographical unit or subdivision of the state was set apart by legislative action authorizing special, unique and non-uniform tax treatment in the designated area specially benefited by the public improvements to which the tax proceeds were devoted. In the present case the Texas Legislature, by the joint resolution authorizing submission of Article VIII, Section 1-a to the people and by the enabling act now challenged,[2] effectively defined an area composed of Grimes and nine adjacent counties grouped at the mouth of the Brazos River and authorized therein special, unique and non-uniform taxation (by means of a convenient, then-existing levy procedure). Likewise, the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements by the Brazos District which improvements had long before been found by the Legislature to be "the only practical and legal means"[3] for relieving these counties of "recurrent, devastating floods."[4]

The decisions of this Court referred to previously make one other point which is pertinent here. They emphasize

---

[2] H.J.R. No. 24, Acts 50th Leg., 1947, p. 1190; Acts 51st Leg., R.S. 1949, ch. 464, § 10(a), now codified as Article 7048a, Vernon's Annotated Civil Statutes of Texas.

[3] Acts 44th Leg., R.S. 1935, ch. 19, § 3(a). This act and most of the other earlier legislation concerning the Brazos District is collected in a note following Article 8197f, Vernon's Annotated Civil Statutes of Texas, Vol. 21, page 536, et seq.

[4] Acts 44th Leg., 1st C.S. 1935, ch. 368, § 5.

that taxpayers who would successfully challenge a legislative classification as not being reasonably related to flood control or to any other object or purpose must do more than simply argue general principles and "submit" that the legislature's classification is "palpably arbitrary and a plain abuse." In cases involving public improvements this Court requires that complaining taxpayers *prove* beyond all doubt by competent evidence that express or implied legislative fact findings of special benefit are arbitrary. The present record is utterly deficient in this regard. From a factual standpoint it proves only that appellants Foster, Franklow and Hall own land in Grimes County, some of which is outside the watershed of the Brazos River.[5]

Moreover, aside from appellants' failure to offer any proof pertaining to the receipt or non-receipt by Grimes County of special benefits from the public improvements undertaken by the Brazos District, there is in this case an independent factor which precluded any effective disproving of special benefits to Grimes County even if that burden had been undertaken. For, as disclosed by the opinion of the Court of Civil Appeals, the Supreme Court of Texas in *Brazos River Conservation and Reclamation Dist.* v. *McCraw*, 126 Tex. 506, 91 S. W. 2d 665 (1936), in holding that "the existence of this river uncontrolled is a continuing public calamity" within the meaning of Article III, Section 51 of the Texas Constitution, necessarily considered the identical factual criteria which control the issue of special benefits *vel non* to Grimes County from a coordinated and comprehensive system of stream regulation. That state court decision predetermined the merits of the federal question now raised by appellants.

---

[5] Indeed, nothing whatever was proved as to appellant Dyer nor as to any other taxpayer in Grimes or in other remission counties. Thus, while plead and argued here as if it were a class action, in reality this is an appeal by three taxpayers who represent only themselves.

Factual criteria then before the Texas Supreme Court—including numerous legislative fact findings as well as the agreed and judicially-known physical facts and flood history—fully sustained its general holding that a public calamity existed as well as its conclusion in support thereof that:

> "The principal damage from overflows by the Brazos River lies south and southeast of Waco. The counties *suffering most* from this cause are shown [on an attached map] in shaded portions or in colors along the lower reaches of the Brazos, beginning with Milam and Robertson Counties and extending to the Gulf of Mexico [including Grimes] . . ." (126 Tex. at 513, 91 S. W. 2d at 669).

Appellees submit that an inescapable corollary of this holding is that the same ten counties, including Grimes, which had "suffered most" from the calamity would benefit most from the flood control works constructed by the Brazos District. The ten counties which had sustained "the principal damage" from floods would inevitably be the counties specially, immediately and mainly benefited by flood control.[6]

Further Argument Is Unnecessary

In addition to the lack of substance in this appeal which is shown by the decisions already referred to, appellees submit that the following decisions (either dismissing "for want of a substantial federal question" or affirming because the question raised is "so wanting in substance as not to need further argument") are entirely sufficient in themselves to show that further argument of this appeal is unnecessary. All of the present appellants' serious arguments were presented and rejected in these cases. *Big Slough*

---

[6] Prevention of the "recurrent, devastating floods in the valley of the Brazos River" is the declared primary purpose of the Brazos District. See Acts 44th Leg., 1st C.S. 1935, ch. 368 §§ 5, 6.

Drainage Dist. v. *Board of County Comm'rs*, 336 U. S. 957 (1949); *Martha Bright Farms, Inc.* v. *Davis*, 293 U. S. 531 (1934); *Board of Comm'rs* v. *Ohio ex rel. Bowman*, 286 U. S. 526 (1932); *Milheim* v. *Moffat Tunnel Impr. Dist.*, 262 U. S. 710 (1923); *Miller & Lux, Inc.* v. *Sacramento & San Juaquin Drainage Dist.*, 256 U. S. 129 (1921).

WHEREFORE, Appellees respectfully move that this appeal be dismissed or, in the alternative, that the judgment of the Court of Civil Appeals be affirmed.

Respectfully submitted,

JOHN BEN SHEPPERD,
Attorney General of Texas;
PHILLIP ROBINSON,
Assistant Attorney General;
Capitol Station,
Austin, Texas;
CHARLES L. BLACK,
Capital National
Bank Building,
Austin, Texas;
CARLOS B. MASTERSON,
Angleton, Texas;
CHAS. W. BELL,
Second National
Bank Building,
Houston, Texas,
Attorneys for Appellees.

COPY

Office - Supreme Court,
FILED
OCT 30 1953
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL,
Appellants,

vs.

EMORY BAY, ET AL,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

HENRY H. BROOKS
GAYNOR KENDALL
WALTER R. KOCH
Capital National Bank Building
Austin, Texas
Counsel for Appellants

HULON H. HALL
Navasota, Texas
BILL PALMOS
Hearne, Texas
Of Counsel

TABLE OF CONTENTS

	Page
Table of Authorities	i
Preliminary Statement	1
ARGUMENT	2
The argument advanced by appellee rests upon the assumption of a statute wholly different from those here challenged, and the decisions cited by appellees are consequently inapposite	2
A. The challenged statutes expressly declare the object of the tax to be "for general revenue purposes" of the State, not for designated public improvements; and they specify the areas to be taxed as those "from which tax donations" had been granted, not as areas specially benefited by designated improvements	2
B. The statutes which appellees cite as carrying a legislative finding that the taxed areas are specially benefited by Brazos District improvements not only fail to support the asserted finding but define as to such improvements a "benefit area" distinct and different from that to which the challenged taxes apply	5
C. The 1936 decision of the Supreme Court of Texas in Brazos River Conservation a l Reclamation District v. McCraw is not stare c sis of the validity of the amendment to the Texas Constitution adopted in 1948, providing for continued taxation of appellants' properties after 1951	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

	Page
Big Slough Drainage Dist. v. Board of County Comm'rs, 336 U.S. 957	3
Board of Comm'rs v. Ohio ex rel. Bowman, 286 U.S. 256	3
Brazos River Conservation & Reclamation Dist. v. McCraw, 136 Tex. 506, 91 S.W. 2d 665	9
County of Mobile v. Kimball, 102 U.S. 691	3
Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112	3, 8
Hagar v. Reclamation District, 111 U.S. 701	3
Houck v. Little River District, 239 U.S. 254	3
Martha Bright Farms, Inc. v. Davis, 293 U.S. 531	3
Milheim v. Moffat Tunnel Impr. Dist., 262 U.S. 710	3, 8
Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist., 256 U.S. 129	3
Spencer v. Merchant, 125 U.S. 345	3
Williams v. Eggleston, 170 U.S. 304	3

Texas Statutes

Section 1a, Article VIII, Texas Constitution	2
Section 51, Article III, Texas Constitution	9
Acts 44th Leg., Reg. Sess. 1935, Chap. 19	6
Acts of 1st Called Session, 44th Leg., Chap. 368, p. 1527	2, 4, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

GUY E. FOSTER, ET AL,
Appellants,

vs.

EMORY BAY, ET AL,
Appellees.

Appellants' Brief in Opposition to the Motion To Dismiss or Affirm

---

The "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" which has been filed by appellees does not challenge the jurisdiction of this Court over the appeal, but is predicated entirely upon their assertion that the federal question is unsubstantial. This brief consequently will be limited to the substantive question, and is intended to supplement the discussion contained in the Jurisdictional Statement.

The argument advanced by appellees rests upon the assumption of a statute wholly different from those here challenged, and the decisions cited by appellees are consequently inapposite.

A. The challenged statutes expressly declare the object of the tax to be "for general revenue purposes" of the State, not for designated public improvements; and they specify the areas to be taxed as those "from which tax donations" had been granted, not as areas specially benefited by designated improvements.

In abolishing the state ad valorem tax "for general revenue purposes" formerly levied uniformly on properties throughout the state, the challenged Texas constitutional amendment[1] provided that nevertheless "the full amount of the State ad valorem tax" should for the term specified "continue" to be levied in those areas "from which tax donations have heretofore been granted." The enabling act[2] thereunder is to like effect.

In the Jurisdictional Statement, appellants attacked the purported classification by which the tax was thus continued as to some of the original class of taxpayers, and discontinued as to remainder, upon the ground that the basis of discrimination employed by the challenged statutes is not reasonably related to the object of raising funds for general revenue purposes of the State.

---

[1] Section 1a, Article VIII, Texas Constitution; copied in full as Item 1, Appendix B of the "Jurisdictional Statement."

[2] Section 10(a), Chap. 364. p. 853, Acts Reg. Sess. 51st Legis. of Texas, as amended by Chap. 389, p. 672, Acts 52nd Legis. Copied as Item 2, Appendix B of the Jurisdictional Statement.

Appellees do not, in their Motion to Dismiss or Affirm, attempt to defend the classification which the challenged statutes employ: they do not argue that the basis of discrimination stated in the statutes is reasonable, or properly related to the object of raising funds for general state purposes.

Instead, appellees first launch into a general discussion of the decisions by this Court which hold that a tax imposed by a state to defray the cost of a specifc public improvement constitutes no denial of equal protection because it is limited to properties within a geographical area which is found specially benefited by such improvement. *Houck v. Little River District* (1915) 239 U.S. 254, and *Hagar v. Reclamation District* (1884) 111 U.S. 701 are typical; the other cases cited by appellees are listed below in the margin.[3] Appellees then assert that "the substance" of the challenged statutes "is identical in effect" with the legislation sustained by this Court in such cases as *Houck* and *Hagar*. But the motion will be searched in vain for a single word quoted by appellees from the challenged statutes for any purpose, much less to demonstrate the asserted substantial identity of the statutes in controversy with those heretofore sustained.

---

[3] *County of Mobile v. Kimball* (1880) 102 U.S. 691; *Spencer v. Merchant* (1888) 125 U.S. 345; *Fallbrook Irrigation Dist. v. Bradley* (1896) 164 U.S. 112; *Williams v. Eggleston* (1897) 170 U.S. 304; *Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist.* (1921) 256 U.S. 129; *Big Slough Drainage Dist. v. Board of County Comm'rs* (1949) 336 U.S. 957; *Martha Bright Farms, Inc. v. Davis* (1934) 293 U.S. 531; *Board of Comm'rs v. Ohio ex rel. Bowman* (1932) 286 U.S. 256; *Milheim v. Moffat Tunnel Impr. Dist.* (1923) 262 U.S. 710.

At all events, the only defense which appellees' motion makes of the challenged statutes is hinged upon the assumption that (a) the tax levied thereby is for specific public improvements, and (b) the area to which the tax is limited was selected to bear the burden because of an express or implied finding that it was specially benefited by such improvements. The first, and we submit, complete answer to any such conception is that the challenged statutes themselves both expressly state the object of the tax as being "for general revenue purposes" of the State—not for a specific public improvement.

The Motion does not assume to say just what operates to change the tax from the declared object of raising funds "for general revenue purposes" to a tax for specific public improvements, unless the assertion (p. 5 of typewritten copy) that "the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements by the Brazos District" is sufficient.

It is true that so much as is necessary of the proceeds of the challenged levies are allocated to the discharge of the appropriation made by the State to the Brazos District under the 1935 "tax donation" act.* In 1951, the levy of 30c per hundred on properties within the ten counties named in the 1935 act amounted to $928,633.88; and of this, $309,000 was paid over to the Brazos District in discharge of the annual state appropriation made by the 1935 act.

* Chap. 368, p. 1527, Acts 1st Called Session, 44th Legis. Copied in pertinent part as Item 3, Appendix B of the Jurisdictional Statement.

However, the fact that part of the proceeds of the tax laid "for general revenue purposes" were used to pay off an appropriation to an improvement district (or even had they been used for the construction of a work of improvement by the state itself) does not change the object or purpose of the tax to one "for public improvements" in attempting to justify its limitation to a particular area. The conception that such use of the proceeds supports the challenged tax as one for improvements, and consequently justifies its limitation to the ten-county area named in the 1935 appropriation act, is more fully considered and answered in the last four pages of the Jurisdictional Statement. For the additional reasons there stated, we respectfully submit that appellees' argument is without merit, and that the validity of the challenged statutes is to be measured by the object therein stated, and by the basis of classification expressly employed by the statutes.

B. The statutes which appellees cite as carrying a legislative finding that the taxed areas are specially benefited by Brazos District improvements not only fail to support the asserted finding, but define as to such improvements a "benefit area" distinct and different from that to which the challenged taxes apply.

In arguing that the challenged taxes are to be considered special levies imposed upon Grimes and the nine other counties named in the 1935 tax-donation act, appellees assert in the Motion to Dismiss or Affirm (page 5):

"Likewise, the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements

by the Brazos District which improvements had long before been found by the Legislature to be 'the only practical and legal means' [citing by footnote Acts 44th Leg., Reg. Sess. 1935, Ch. 19, § 3(a)] for relieving *these counties* 'of recurrent, devastating floods'." [Citing for the last internal quotation, Acts of 1st Called Session, 44th Legislature, Chap. 368, § 5. Emphasis supplied.]

Thus stated, it would indeed appear that the ten-county area (including Grimes County) had been found in the earlier legislation cited to be specially benefited by the Brazos District's dam. We submit, however, that the statutes themselves not only fail to support the asserted finding of special benefit to the ten-county area, but that they affirmatively disclose that the area found specially benefited by Brazos District improvements is a distinct and different area. For convenience of reference, section 3(a) of Chapter 19 is copied in the margin as footnote 5; and Section 5 of Chapter 368 is copied as footnote 6. The language of these statutes, in full context, discloses that the area as to which the control of floods upon the Brazos and its tributaries would constitute a special benefit is defined in terms

---

[5] "Sec. 3. The Brazos River Conservation and Reclamation District shall have and be recognized to exercise, . . . the powers of control and employment of such flood, storm and unappropriated flow waters of the said district in the manner and for the particular purposes hereinafter set forth.

"(a) To provide through the only practical and legal means for the control and the coordination of the regulation of the waters of the watershed of the Brazos River and its tributary streams as a unit."

[6] "Sec. 5. The District shall have the authority and it is hereby authorized to issue its negotiable bonds, secured only

of the "valley" and "watershed" of the Brazos River and its tributary streams. In consequence, the legislature provided that the permanent boundaries of the Brazos River Conservation and Reclamation District should embrace the watershed of the Brazos River and its tributary streams (excepting that portion within Freestone, Leon and Madison Counties), as defined by written course and distance calls prepared and filed by the State Board of Water Engineers. This vast area, covering parts of 65 counties, stretches diagonally across Texas, and is outlined on the map introduced as Plaintiff's Exhibit 7, which has been sent up in original form. Under the decisions of this Court, the creation of the District constituted an implied legislative finding that its works

---

by pledge of the sums granted and/or donated by the State of Texas and/or out of any other current revenues of the District in any such amounts as may be authorized by the Directors of such District, which sums shall be paid to the legal holders of said bonds, for the purpose of purchasing, acquiring and/or condemning lands, leases, easements and/or acquittances, rights-of-way, structures and/or buildings, equipment, and/or operation of proper structures, dams, reservoirs, suitable for the control of the recurrent, *devastating floods in the valley of the Brazos River*, which have, over a long period of years, caused a deplorable loss of life and property, and the erosion of the soil and a depletion of the fertility of the lands *in said valley and the watershed served by the Brazos River in Texas*, and the public highways and structures and lands belonging to the State of Texas situated *within said water-shed;* all of which is hereby declared to be a public calamity, and doing all things necessary in the execution of the purposes for which the District is created and exists. The moneys herein and hereby granted and/or donated to the Brazos River Conservation and Reclamation District are declared to be for the purposes of discharging obligations herein authorized." (Emphasis supplied.)

would constitute a special benefit to all properties located *within* its boundaries. *Fallbrook Irrigation District v. Bradley* (1896) 164 U.S. 112, 174; *Milheim v. Moffatt Tunnel District* (1923) 262 U.S. 55, 58. But the implications arising from the statutory findings incident to the establishment of this District do not aid the argument advanced by appellees. The challenged taxes are not levied by the District, but by the State. The tax is not levied on all properties within the District: nor is it levied only on properties within part of the District. Instead, it is levied on properties within ten counties, whether the properties are located within the District or not.

We therefore respectfully submit that the very statutes which appellees cite, affirmatively disclose that the area found by the legislature to derive special benefit from Brazos District improvements is a distinct and different area from that within which the tax is imposed by the challenged statutes. These legislative findings moreover accord with the elementary physical fact that the dam built by the Brazos District on the Brazos River in Palo Pinto County can hardly be said with reason to constitute a special benefit to appellants' lands over two hundred miles away and situated in the watershed of the Trinity, a wholly different river system.

C. The 1936 decision of the Supreme Court of Texas in Brazos River Conservation and Reclamation District v. McCraw is not stare decisis of the validity of the amendment to the Texas Constitution adopted in 1948, providing for continued taxation of appellants' properties after 1951.

There remains to be noticed one final effort in the Motion to Dismiss or Affirm to discover some author-

ity to support appellees' "special benefits" argument. Appellees contend that the Supreme Court of Texas in *Brazos River Conservation and Reclamation District v. McCraw* (1936) 126 Tex. 506, 91 S. W. 2d 665, judicially determined that Grimes County is one of ten specially benefiting "from the public improvements undertaken by the Brazos District."

The *McCraw* case was a mandamus proceeding against the Attorney General of Texas to compel his approval of a bond issue of the District. The cause was submitted on an agreed statement of facts. The principal question there presented was whether the appropriation made to the Brazos District by the 1935 tax-donation act[1] constituted a "grant ... of public moneys" to a "municipal or other corporation" prohibited by Art. III, § 51 of the Texas Constitution, or whether the appropriation came within the exception allowing such a "grant of aid in cases of public calamity." Upholding the appropriation under the "calamity" exception, Mr. Chief Justice Cureton in the course of an extended opinion made the following remarks which appellees quote:

"The principal damage from overflows by the Brazos River lies south and southeast of Waco. The counties suffering most from this cause are shown [on attached map] in shaded portions or colors along the lower reaches of the Brazos, beginning with Milam and Robertson Counties and extending to the Gulf of Mexico * * *." 126 Tex. 506, 513, 91 S.W. 2d 665, 669.

---

[1] Chap. 368, p. 1527, Acts 1st Called Sess. 44th Legis. of Texas.

Noting that Grimes County was within the shaded area on the attached map, appellees assert that this statement constitutes a judicial determination that Grimes County is one which would be specially benefited "by flood control." And appellees infer that the dam built by the Brazos District furnishes such "flood control." And by *construction* of the statement, appellees conclude that it constitutes a judicial finding of special benefits to Grimes County accruing from the dam built by the Brazos District.

In response, it is worthy of first notice that the argument is dependent upon the validity of appellees' assumption that the tax levied by the challenged statutes levy a tax for a specific public improvement. As has already been demonstrated, that premise is faulty, and in consequence argument as to assumed "special benefits" cannot sustain the challenged statutes.

But the suggestion that the quoted statement constitutes a judicial determination as to special benefits is intrinsically without merit. In the first place, there was no issue in the McCraw case involving a determination of whether Grimes County or any other county or counties, would be specially benefited by the proposed works of the Brazos District. No question was raised as to whether Grimes County or any other designated area could be taxed to support the proposed improvements, as no such tax was involved. In consequence, the question of special benefits was not briefed or mentioned by counsel for either side. A reading of the opinion of the Court will disclose that it did not undertake to determine such questions.

Moreover, the statement quoted from the opinion by appellees not only must be "construed" to have the meaning which appellees assert for it, but no basis for the statement can be found in either the agreed statement on which the case was tried, or in the pleadings or briefs of the parties. And while appellees make reference to legislative history, no act is cited which could furnish basis for the statement.

At all events it would seem obvious that such a statement, made *arguendo* in 1936 hardly can be considered determinative of the question whether the challenged statutes adopted twelve years and more later, deny to appellants the equal protection of the laws in discriminating against them in taxation beginning for the first time in 1951.

CONCLUSION

The Motion to Dismiss or Affirm should be denied, and the case should be set for argument.

Respectfully submitted,

HENRY H. BROOKS
GAYNOR KENDALL
WALTER R. KOCH
Capital National Bank Building
Austin, Texas

Counsel for Appellants

HULON H. HALL
Navasota, Texas

BILL PALMOS
Hearne, Texas

Of Counsel

No. 443. FOSTER ET AL. *v.* BAY ET AL. Appeal from the Court of Civil Appeals of Texas, First Supreme Judicial District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Henry H. Brooks* for appellants. *John Ben Shepperd*, Attorney General of Texas, *Phillip Robinson*, Assistant Attorney General, *Charles L. Black* and *Charles W. Bell* for appellees. Reported below: 255 S. W. 2d 898.